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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

Number 442

MILDRED S. STINSON,
as Administratrix of the Estate of A. Bruce Stinson,
Deceased, suing as such Administratrix,
Petitioner,

—vs—

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

## PETITION FOR REHEARING.

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**Petitioner,**

—vs—

**ATLANTIC COAST LINE RAILROAD COMPANY,**

**Respondent.**

## PETITION FOR REHEARING

Comes the Respondent, Atlantic Coast Line Railroad Company, by its Attorneys, and petitions the Court for a rehearing upon its opinion and order entered herein on the 18th day of November, 1957, and moves the Court that the mandate thereon be withheld pending consideration hereof and that the opinion and order entered November 18, 1957, be withdrawn and that this cause be restored to the docket for hearing upon the issues involved as provided by the Rules of this Court. As grounds therefor, Respondent shows unto the court:

1. The order of November 18, 1957 improperly deprives Respondent of his right to be heard upon the merits of the case.

2. Upon reversal of a jury verdict and judgment for Respondent, this Court may not properly reinstate a prior verdict of the jury and judgment in favor of the opposite party (Petitioner) which had been annulled by the Supreme Court of Alabama in the exercise of its plenary power on a prior appeal.

3. The summary opinion erroneously concludes that the evidence in the record is sufficient to provide a **reasonable inference** that any negligence of the Respondent operated as the proximate cause, in whole or in part, of the employee's death.

## ARGUMENT

Respondent will briefly elaborate upon these three grounds in the same order as they appear.

1. (a) In reversing the judgment of the Supreme Court of Alabama which affirmed a verdict of the jury and judgment of the trial court in favor of Respondent, and (b) in undertaking to reinstate a prior judgment of recovery in favor of Petitioner, the summary order and opinion of November 18, 1957 improperly and unlawfully deprives Respondent of the right to be heard upon the merits of the case in keeping with law and the rules of this Court and thus denies Respondent its right to a fair and impartial trial.

In our constitutional Republic, the right to be heard is the heart and the core of the administration of justice. Orderly and stable rules of procedure are the sine qua non of undertaking to achieve it.

Conforming to the requirement of Paragraph 1, Rule 24, our brief in opposition to the grant of the

Petition for Writ of Certiorari was confined to the preliminary question whether this Court properly has or should take jurisdiction of this case, or "why the cause should not be reviewed by this Court". (Respondent's brief, pages 7, 8, footnote No. 5). Respondent had the right to assume, and was required to anticipate, that upon the granting of the Petition further proceedings would be held conformably with Rules 26 and 36 (establishment, printing and distribution of the appropriate record), the preparation and filing of definitive briefs and arguments on all issues affecting the merits of the cause (Rule 41), and the right to be further heard upon the issues in keeping with the express provisions of Rules 43 and 44.

The summary order of November 18th not only deals with the merits as related to the particular judgment of the Supreme Court of Alabama affirming a verdict and a judgment of the lower Court in favor of Respondent, but it goes much farther. It takes even a wider reach, for after reversing the verdict and judgment in favor of this Respondent, it undertakes to "leap frog" back and reinstate a former verdict and judgment of the trial Court in favor of the Petitioner which had theretofore become a complete nullity by the formal action of the Supreme Court of Alabama on a former appeal. All this the summary order of November 18, 1957 does in complete disregard of the rules of procedure adopted and published by the Court for the administration of justice (Rules 26, 36, 41, 43 and 44).

Respondent earnestly submits that the summary order of November 18, 1957 improperly and unlawfully deprives this Respondent of its right to be heard

upon the merits of the case in keeping with its rights and the rules of this Court, and thus denies to Respondent its right to a fair and impartial trial.

2. On June 12, 1953 Petitioner by jury verdict was awarded $46,600. On appeal to the Supreme Court of Alabama that judgment was reversed and remanded for new trial in conformity with the Court's opinion (88 So. 2d 189). The original verdict was thereupon set aside and expunged from the record as though it had never existed.

(a) In undertaking to reinstate that prior verdict and judgment which had become a complete nullity, the order of November 18, 1957 exceeds the lawful authority and proper power of this Court.

The judgment posed for review by this Court is the judgment of the Supreme Court of Alabama entered June 20, 1957 (Petition, p. 2 and its Appendix, p. 27a) which affirmed a judgment of the trial court **in favor of Respondent based upon a verdict of the jury in favor of Respondent,** returned after instructions to the jury by the trial court (R. 23). The record also shows that upon a previous trial the issues had been submitted to the jury by the trial court upon instructions held to be erroneous by the Supreme Court of Alabama on proper appeal (R. 31-32) and that such prior verdict and judgment had been reversed and annulled by the Supreme Court of Alabama on June 21, 1956 (**Atlantic Coast Line Railroad Company v. Stinson,** 264 Ala. 522, 88 So. 2d 189) and the case remanded to the trial court for a new trial.

The only question actually passed upon by the Supreme Court of Alabama on such prior appeal was

whether the trial court correctly instructed the jury upon the issues made by the evidence. Whether the reasoning of the Supreme Court of Alabama on this first appeal was sound or unsound, the conclusive result of its judicial action on the case before it on proper appeal was to restore the case to the jury trial docket of the trial court as though the case had never been tried.

In this posture of affairs, the earlier annulled verdict and judgment may not now be properly reinstated. This was the express ruling of this Court in **Shepherd** v. **Thompson,** 122 U.S. 231, 30 L. ed. 1156, which remains unmodified and unreversed.

In this Shepherd case, a first trial resulted in a verdict and judgment in favor of the Defendant upon instructions of the trial court relative to the issues. This first verdict and judgment for the Defendant had thereafter been set aside upon further judicial finding that the trial court had erroneously instructed the jury. A second trial upon different instructions to the jury, on the identical issue and the same evidence, had resulted in a verdict and judgment in favor of the plaintiff. Upon ultimate appeal to this Court it held that the instructions given the jury by the trial court on the **second trial** (the subject of the appeal) were erroneous and that the issues had been properly submitted to the jury on the first trial by proper instructions. This Court reversed and remanded the case to the Supreme Court of the District of Columbia with directions to set aside the second verdict and to order a new trial. **There too,** insistance was made that the verdict and judgment on first trial be ordered reinstated. In refusing to do so and in holding that

after the Supreme Court of the District of Columbia, upon proper bill of exceptions before it, ordered a second trial **the case stood as if it never had been** tried before, this Court said (p. 1159 of 30 L. ed.):

> "The result is that the judgment below must be reversed, and the verdict against the defendant set aside. It was contended by his counsel that this court should now direct judgment to be entered upon a former verdict, which was returned for him under a correct ruling on the question of acknowledgment, and set aside by the court in General Term upon a different view of the law. In support of this contention was cited Coughlin v. District of Columbia, 106 U.S. 7 (27: 74). But the reason for ordering judgment upon the first verdict in that case was not that the court in General Term had wrongly decided a question of law upon a bill of exceptions allowed at the first trial; but that, as appeared of record, independently of any bill of exceptions, the question had not been legally brought before it at all, thus leaving the first verdict in full force. In the present case, it had authority to entertain and pass the exceptions taken by the plaintiff at the first trial; when, in the exercise of that authority, it had sustained those exceptions and ordered a second trial, the case stood as if it had never been tried before; and only the rulings at the second trial, and no rulings, whether similar or different, at the former trial, could be brought to the General Term by the exceptions of the defendant, or to this court by his writ of error."

Search has revealed no modification of this decision and, indeed, no other instance in which this particular question has been passed upon by this Court.

Absence of further decisions on this question is eloquent testimony of the soundness of the Shepherd decision.

Nothing in **Urie** v. **Thompson,** 337 U.S. 163; 93 L. ed. 1282, cited by the Court in its summary order of November 18, 1957, is either contrary to the sound doctrine of the Shepherd case, supra, or affords any basis for reinstatement of a separate verdict and judgment prior to the verdict and judgment subject to review. In the Urie case it appears there had never been but **one jury verdict and judgment;** a verdict and judgment for the plaintiff employer which the Missouri Supreme Court reversed and which, on review of that specific judgment, this Court ordered reinstated upon its reversal of the action of the Missouri Court which set it aside. The first opinion of the Missouri Court was entered on appeal from the action of the trial court in sustaining demurrer to the complaint, and reversed and remanded the case for trial, holding that while the complaint was insufficient under the Federal Employers' Liability Act (45 U.S.C.A., Section 51), it did state a claim under the Boiler Inspection Act (45 U.S.C.A., Sec. 23, et seq.) After a full trial was had on the amended complaint the verdict and judgment thereon was reversed by the Missouri Court again on a question of pleading — reversing itself and holding the complaint insufficient under the Boiler Inspection Act. The effect of the decision here on review of that latter action was simply to hold that this Court was not precluded from considering the **sufficiency of the**

**pleadings** by a previous interlocutory order holding the complaint insufficient in part.

It is clear from the action taken in the Urie Case, as well as from the other decisions and authorities cited in the Urie opinion, that this Court's permissible consideration of antecedent judgments or orders in the court of the litigation has validity or propriety only as related to the ultimate conclusion whether the particular judgment under review should be affirmed or reversed.

In connection with the recognized limitations upon the authority of Federal Appellate Courts to order entry of judgments notwithstanding verdicts of juries (even though erroneously instructed in the first instance) attention is invited to the decision in **Aetna Insurance Company** v. **Kennedy**, 301 U.S. 389; 85 L. ed. 1177 (1181), hereinafter more particularly referred to.

(b) The summary order of November 18, 1957 deprives Respondent of its right to a trial by jury and transgresses Respondent's constitutional rights.

The scope of authority of the Courts of the United States in respect to trials by jury is spelled out in the 7th amendment to the Constitution of the United States, which provides, in pertinent part:

> "* * * no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The limitations imposed by these constitutional provisions upon the appellate Courts of the United States and upon their authority to direct entry of judgment

for one party, notwithstanding the existence of a verdict of the jury and a judgment in favor of the other party, was exhaustively considered by this Court in **Slocum, Executrix** v. **New York Life Ins. Co.**, 228 U.S. 364 (375 et seq.), 57 L. ed. 879.

We shall not undertake to set out either the facts or the extensive canvass of authorities covered in that decision, but call the Court's attention to the summation of its holding (page 894 of 57 L. ed.):

> "In the present case certain well-defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the Constitution to have tried to the court and a jury. Such a trial was had and resulted in a general verdict resolving all the issues in the plaintiff's favor. That verdict operated, under the Constitution, to prevent a re-examination of the issues save on a new trial granted by the trial court in the exercise of its discretion, or ordered by the appellate court for error of law. At the trial the defendant requested that a verdict in its favor be directed, and had the court indicated its purpose to do that, it would have been open to the plaintiff, under the then prevailing practice, to take a voluntary nonsuit, which would have enabled her to make a fuller and better presentation of her case, if the facts permitted, at another trial in a new suit. But the defendant's request being denied and a verdict being returned for the plaintiff, she recovered a judgment. That judgment the circuit court of appeals reversed, and rightly so, because the defendant's request, in the state of the evidence, ought, as matter of law, to have been granted. The reversal operated to set aside the

> verdict and to put the issues at large, as they were before it was given. But, instead of ordering a new trial, as was required at common law, the circuit court of appeals itself re-examined the issues, resolved them in favor of the defendant, and directed the judgment accordingly. This, we hold, could not be done consistently with the 7th Amendment, which not only preserves the common-law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be re-examined otherwise than 'according to the rules of common law.'"

Certain particular instances in which, under the recognized rules and requirements of the common law, appellate courts could order the entry of judgment notwithstanding the verdicts of juries, were considered by this Court in **Baltimore & C. Line** v. **Redman,** 295 U.S. 645, 79 L. ed. 1636. It is largely to the exceptional instances and particular procedure indicated in the **Redman** decision that the present Rule 50(b) of the Federal Rules of Civil Procedure, applicable only to cases originating in the courts of the United States, owes its origin.

That the principles set forth in the **Redman** case are inapplicable to the situation before the Court in this case, and that the fundamental governing principles stated in the **Slocum** case are here applicable, is clearly shown in the decision of this Court in **Aetna Insurance Co.** v. **Kennedy,** 301 U.S. 389, 81 L. ed. 1177. There, after verdict and judgment in the trial Court in favor of the Defendant (both parties having requested the direction of verdict in their favor), on appeal the Circuit Court of Appeals reversed the trial court and fur-

ther directed the entry of judgment in favor of the Plaintiff for the agreed amount of the loss in question. On review this Court held the action of the Circuit Court of Appeals to be in error in directing entry of judgment notwithstanding the verdict although it affirmed the action of the Court of Appeals in reversing the judgment in favor of the Defendant. In so doing, this Court appropriately held (page 1181 of 81 L. ed.):

> "The verdicts were taken unconditionally. Plaintiff moved for new trials but not for judgments. The court denied her motions and entered judgments for defendants. The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff. And, as before submission of the case to the jury the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that notwithstanding the verdicts plaintiff was entitled to recover. Slocum v. New York L. Ins. Co., 228 U.S. 364, 387, 57 L. ed. 879, 889, 33 S. Ct. 523, Ann. Cas. 1914D, 1029. Our decision in Baltimore & C. Line v. Redman, 295 U.S. 654, 79 L. ed. 1636, 55 S. Ct. 890, is not applicable.
>
> "There is another reason why the direction of judgments for plaintiff cannot stand. Under the Conformity Act, 28 U. S. C. A. Sec. 724, federal courts follow the practice authorized by state statute, if there be nothing in them that is incongruous with their organization of their fundamen-

tal procedure or in conflict with congressional enactment."

It is interesting to note that in both the **Slocum** and the **Kennedy** cases a statute of the State of Pennsylvania authorized the entry of judgments notwithstanding the verdict in jury cases under various conditions.

Alabama is a common law state, and the right of trial by jury is preserved by its Constitution and laws. There is no constitutional or statutory authorization to the Supreme Court of Alabama to enter judgments notwithstanding the verdict in any case in which it finds the proceedings affected by error or in which it may find the evidence is insufficient to support a verdict and judgment in favor of a party accorded them.

Respondent elected to put on no witnesses on both trials of this case. But by doing so it did not forever waive its right to do so. If the verdict of the jury in its favor be set aside, it has the right to adduce on its behalf any additional evidence it may have and not to be mulct of damages without opportunity to do so at another proper trial.

The summary order of November 18, 1957 deprives Respondent of its right to a jury trial. If the only existing verdict before this Court is to be set aside, then the limit of the Court's jurisdiction is to direct the Court below to grant a new trial, so that this cause might be tried anew under the principles of law promulgated.

3. The summary order of November 18, 1957 is in error in concluding that the record evidence is sufficient to afford a reasonable inference that any neg-

ligence of Respondent operated as the proximate cause in whole or in part of the employee's death.

Whatever may be the variations of factual application, throughout all recent F.E.L.A. decisions of this Court it has stated the controlling doctrine to be that, in order to bottom recovery, the **probative facts** must **reasonably show,** not only a negligent act or omission by the employer, but also that the injury complained of was a reasonably foreseeable consequence of the negligent act or omission complained of. **Ringhiser** v. **Chesapeake & Ohio Railway Co.,** ——U.S.—— 1 L. ed. 2d 1268. In that case the Court found that there was evidence that to the Railroad's knowledge

> " * * * employees used gondola cars for the purpose (for which Ringhiser used the car). In that circumstance there were probative facts from which the jury could find that respondent (railroad company) was or should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did."

Here the only act or omission involved is the **alleged** negligent "operation" of a train (Count Five, R-18-19, 23). The safety of a place to work, sufficiency or condition of tools or equipment, orders of superiors, etc., are in no way involved. The evidence shows without conflict that Mr. Stinson left his post of duty on the engine while work was in progress and that he never returned to it; that his completely nude body was later found almost a mile from the place he left the standing engine (R. 203-204); that **all** his clothes were "wadded up" on the track about 150 feet from where his body was severed athwart the rail (R. 200) with indications of blood and drag markings in the 150 foot space be-

tween the clothes and the body (R. 205-206); that there were no markings or other indications anywhere on the track between the clothes and where the train had been left standing, nearly a mile away (R. 205-206; 97-101; 116). Plaintiff's evidence also showed without conflict that the deceased left the dining car of the work train ten to fifteen minutes before the train started to back up (R-114-115). Although the evidence showed various others on or about the train between the dining car and the derailment work in the interim, the deceased was not seen on or about the train or scene between the time he left the diner and the time his nude body was later found by a passing train nearly a mile away.

Thus there were no probative facts from which the jury could find that the Respondent railroad company could or should have anticipated the bizarre and wholly mysterious condition under which Mr. Stinson lost his life. And **Ringhiser** is therefore completely distinguishable.

**Rogers** v. **Missouri Pac. R. Co.,** 352 U.S. 500, 1 L. ed. 2d 493, and **Schulz** v. **Pennsylvania R. Co.,** 350 U.S. 523, 100 L. ed. 668, upon which the Court relied in granting certiorari and overturning the judgment below, are equally distinguishable. In each case a hazardous condition existed, of which the railroad had notice. There was no such condition or circumstance in the instant case.

The Petitioner seeks to bottom her claim of alleged negligence in the operation of the train on two points involving Respondent's operating rules (1) the **mere fact** that the fireman was operating the engine, and (2) whether the engine bell was rung before the train was moved.

The evidence shows without conflict that the fireman operated the engine on the move in question in an efficient and prudent manner (R. 133-134). The applicable rules (R. 139-142) required the engineer to remain on the engine or leave the fireman or other competent person in charge (Rule 972) and that the fireman must comply with the instructions of the engineer while on duty (Rule 990). The evidence shows without dispute that Mr. Stinson left instructions for the fireman to assume the duties of engineer in his absence (R. 189, which included operating the engine as needed (R. 184), as well as backing up down the track to switch out the derailed cars (R. 185, 178-179). The fireman was required to obey these instructions (R. 141, 187), and he did so in an efficient and prudent manner (R. 133, 134).

As to the rule which required the bell to be rung before the train was moved: The rule could have no application to an occurrence which took place nearly a mile distant from where the engine commenced its movement. A failure to ring a bell in compliance with the rule could not afford even a **reasonable inference** of any **foreseeable possibility** that the deceased might be run over nearly a mile away.

In short, the evidence—the probative facts—afford no reasonable inference that any act or omission in the operation of the train operated as a proximate cause in whole or in part of the employee's death. The mere fact of injury and death, without more, is not sufficient to give rise to a presumption of causative negligence on the part of the railroad, and Petitioner's claim is supported by nothing more than sheer speculation, built on successive steps of speculation. This is not permitted by the controlling doctrine of the law as repeatedly affirmed by this Court.

We may here aptly say with the Court in **Eckenrode v. Pennsylvania Railroad Company,** 164 Fed. 2d 996, affirmed 335 U.S. 329, 93 L. ed. 41:

> " * * * But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist * * *"

We earnestly submit that there is not the slightest scintilla of evidence in this record of any negligence on the part of this Respondent, in whole or in part proximately causing or contributing to Mr. Stinson's death, and urge that the judgment of the Supreme Court of Alabama affirming the verdict of the jury and the judgment in favor of this Respondent is correct and should stand unmolested.

WHEREFORE, Respondent petitions and moves the Court to withhold the mandate in this case, to withdraw the summary opinion and order of November 18, 1957, and to restore this case to the docket for proper hearing upon all apt questions, as to jurisdiction or the merits, in the manner expressly provided by the rules of this Court.

Respectfully submitted,

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Attorneys for Respondent.

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First National Bank Building
Birmingham, Alabama
Of Counsel for Respondent.

## CERTIFICATE

I, Norman C. Shepard, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is confined to substantial grounds not previously presented to the Court, in compliance with Rule 58(2) of the Rules of this Court.

NORMAN C. SHEPARD

## CERTIFICATE OF SERVICE

I, Norman C. Shepard, one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of December, 1957, that I served a full, true and correct copy of the foregoing Petition for Rehearing on Mildred S. Stinson, as Administratrix, etc., Petitioner herein, by mailing such copy in a duly addressed envelope with first class Air Mail postage prepaid to her Attorney of Record, Joseph S. Lord III Esq., addressed as follows:

JOSEPH S. LORD III, Esq.,
c/o Messrs. Richter, Lord & Levy,
Broad and Sansom Streets,
Philadelphia 7, Pennsylvania,

and duly deposited the same in the United States Post Office at Wilmington, North Carolina on said date.

NORMAN C. SHEPARD